

UNITED STATES DISTRICT COURT

ORIGINAL

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jon S. Tigar, Judge

In Re Ex Parte Application)
of Path Network, Inc. and)
Tempest Hosting, LLC,)

**Motion to Intervene and
Quash, Modify, or Stay**

NO. 23-mc-80148 JST

Pages 1 - 34

Oakland, California
Thursday, March 28, 2024

REPORTER'S TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS

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Thursday, March 28, 2024

2:01 p.m.

P R O C E E D I N G S

(Zoom Webinar)

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THE CLERK: Your Honor, now calling civil matter 23-mc-80148, In Re: Ex-parte Application of Path Network, Inc. and Tempest Hosting LLC v. Discord, Inc.

If counsel could please state their appearances for the record starting with counsel for plaintiffs.

MS. BOGEN: Good morning [sic], Your Honor. Hannah Bogen for applicants Path Network, Inc. and Tempest Hosting, LLC.

MR. SMITH: Good afternoon, Your Honor. Doug Smith of Mayer Brown LLP in Los Angeles, California, on behalf of intervenors Rene Roosen and Hosting King, Inc. doing business as Game Server Kings.

THE COURT: Very good. Welcome.

It's Mr. Smith's motion to quash, so, Mr. Smith, you can go first. I have some questions for each of you. I'll give you each 15 minutes. If my questions eat up all of your time, might give you a little more.

Mr. Smith, you can go first.

MR. SMITH: Yes, Your Honor. Thank you.

Path and Tempest's request here for a subpoena is,

1 frankly, an abuse of the subpoena process, particularly with
2 respect to my clients, Mr. Rene Roosen and Hosting King, Inc.
3 doing business as Game Server Kings.

4 The Court should squash the subpoena in its entirety.
5 Path and Tempest first sought the issuance of the subpoena
6 from the court almost a year ago on May 22nd -- May 22, 2023.
7 The original subpoena was wildly overbroad, unduly intrusive,
8 burdensome, and unlawful, as Magistrate Judge Kang determined.

9 In particular, the subpoena sought the contents of
10 communications in flagrant disregard --

11 **THE COURT:** How does that help you? I mean, Judge --
12 Judge Kang did whatever he did, so now the subpoena is no
13 longer too broad. It's whatever he decided was appropriate,
14 right?

15 **MR. SMITH:** Your Honor --

16 **THE COURT:** My question is, how does -- let's -- so
17 let's say that Path came to court and asked for something that
18 they should not have done.

19 First of all, that happens five days a week here in the
20 district court. The only reason it doesn't happen seven days
21 a week is we're not open on the weekends. People are
22 constantly asking us for things that we don't think they're
23 entitled to.

24 But let's say they did that. How does that help you? How
25 does that help me decide that their subpoena should now be

1 quashed?

2 **MR. SMITH:** Right, Your Honor.

3 So until the subpoena issues, there's precedent in the
4 circuit that Mr. Roosen and Hosting King, who are the
5 targets -- ultimate targets of the subpoena, couldn't have
6 moved to squash beforehand. It would have been premature.

7 So once the subpoena issues, Mr. Roosen and Game Server
8 Kings had the ability to move to quash. And as we set forth,
9 the subpoena is based on the Anton Piller order in the
10 Canadian proceeding. That Anton Piller order, the civil
11 equivalent of a criminal search warrant, expired more than
12 five months ago. There's no --

13 **THE COURT:** Well, let's stop exactly right there,
14 because you say a few times in your brief that they have to be
15 able to prove that they can use the information in the pending
16 proceeding. You cite a Second Circuit case called *Certain*
17 *Funds* that you really like on the point, and that's
18 essentially the argument.

19 The problem that -- that I think there is with that
20 argument is first, *Certain Funds* is not a case that says you
21 have to have a -- an ongoing proceeding with an open period of
22 discovery before you can get a 1782. As I read *Certain Funds*,
23 and I read it very quickly, the problem in that case was the
24 parties who were seeking information were not parties to the
25 underlying proceeding that I want to say was taking place in

1 Saudi Arabia.

2 And so what the Second Circuit said was, because of your
3 status -- your status, not the status of the Saudi Arabian
4 proceeding -- you have no ability to put information before
5 that tribunal at all. That's why the -- they were not
6 successful.

7 And, in fact, what the *Intel* case that you cite several
8 times in your brief says is, we reject the view that 1782
9 comes into play only when adjudicated proceedings are pending
10 or imminent. Instead, we hold that Section 1782(a) requires
11 only that a dispositive ruling by the commission reviewable by
12 the European courts must be within reasonable contemplation.

13 So I think the only thing that -- that Path and the other
14 entity have to establish is something less than the fact that
15 these proceedings are imminent.

16 I don't think they have to establish that there's some
17 open discovery order that they fit into.

18 So I guess that's a long prelude. My question to you is,
19 is what I just said wrong?

20 **MR. SMITH:** Well, Your Honor, your read of Second
21 Circuit decision is correct, but it stands for the fundamental
22 proposition that merely because discovery might be relevant
23 for use in a -- in a foreign proceeding isn't the end of the
24 inquiry.

25 The applicants must be able to actually use the evidence

1 that's obtained through the subpoena in the proceeding itself.
2 And here, the basis for the subpoena was initially the Anton
3 Piller order. That is undisputed now has expired, so there's
4 no basis to get the discovery based on the Anton Piller order.

5 Now, when it was revealed that the Anton Piller order had
6 expired, Path and Tempest now pivot to arguing, oh, well, we
7 need the subpoena so Discord in order to get evidence for
8 discovery in the Canadian litigation.

9 And the question is there is, well, is that proper? And
10 the *Foda* case, a Northern District of California case that we
11 cite and block quoted in our reply brief, makes clear that you
12 don't know if the evidence is actually going to be used in the
13 proceeding if discovery, for example, hasn't even opened yet.

14 And here, there's no indication that discovery has opened
15 in the Canadian proceeding. Also the submissions by Path and
16 Tempest themselves reveal that the Court has stayed all
17 proceedings in that case pending a judge reassignment, a
18 transfer of the case to Toronto, and a pending ruling on a
19 motion to set aside the Anton Piller order as wrongly granted
20 in the first instance.

21 So by Path and Tempest seeking this discovery in this
22 litigation argue [sic] is that they're violating the stay in
23 the Canadian proceeding; they're also circumventing whatever
24 restrictions the Court might impose on discovery because
25 discovery isn't even open yet in the Canadian proceeding.

1 So that's why --

2 **THE COURT:** So let's -- so we're -- it sounds like
3 we're on the same point that we've been on.

4 What is your best case -- what is any case for the
5 proposition that there needs to be a period of open -- that a
6 period of discovery needs to be open at the time the Court
7 issues a subpoena under 1782?

8 Is that *Foda*, which I've not yet read, because it would
9 seem to be very contrary to the proposition from the *Intel*
10 case that I quoted a moment ago.

11 **MR. SMITH:** Well, it's -- it's Path and Tempest's
12 burden to show that the discovery will actually be used in the
13 Canadian case.

14 **THE COURT:** That's not what I just asked you.

15 I'm asking you, first of all, is -- what is the -- given
16 what I -- given how I read *Intel*, which seems to me to be very
17 clear, says there doesn't have to be a current proceeding; it
18 could be imminent or whatever's lower than imminent. That's
19 what it says.

20 So where's the authority that says there has to be a
21 period of discovery that's open at the time the 1782 subpoena
22 is issued? 'Cause that would be the opposite of *Intel*. And
23 maybe the answer is *Foda*, but that's my question.

24 What is the authority for that?

25 **MR. SMITH:** *Foda*, Your Honor. I mean, again, it has

1 to be for use in the proceeding, and if discovery is not
2 opened yet, you can't say it's going to be for use in the
3 proceeding even if it's imminent.

4 Again, the Court in Canada is going to decide whether the
5 Anton Piller order was void ab initio. Maybe it should not
6 have been issued to begin with. And you can't just get
7 discovery willy-nilly on the idea that, you know, there's
8 going to be potentially be a proceeding -- a foreign
9 proceeding at some point. I mean, that's speculative. Right?

10 And here, you know, there's also the issue of one of the
11 discretionary factors is whether there's a circumvention on
12 the limitations imposed by the foreign court on discovery.

13 And here, there is a stay of all proceedings. So what
14 Path and Tempest are doing are asking this Court essentially
15 to allow it to violate the stay of all proceedings in the
16 Canadian litigation by allowing the subpoena to issue.

17 Also, again, discovery isn't opened in that case, so, you
18 know, to talk -- we're not in the situation where there is a
19 potential future litigation. The fact is there is a Canadian
20 litigation. There are orders in that Canadian litigation that
21 Path and Tempest must abide by. And what they're doing by
22 moving -- seeking the subpoena here in -- in the United States
23 is they're circumventing those Canadian court orders.

24 **THE COURT:** You draw the analogy that the Canadian
25 proceeding is like a closed proceeding, but you don't argue

1 that it actually is a closed proceeding, do you?

2 **MR. SMITH:** Your Honor, the -- the entire case is
3 under seal. And I've tried -- my office has tried to --

4 **THE COURT:** Mr. Smith?

5 **MR. SMITH:** Yes, Your Honor.

6 **THE COURT:** The thing that you're stating now, you
7 can say in just a moment. But my question is a "yes" or "no"
8 question.

9 **MR. SMITH:** Sure.

10 **THE COURT:** You do not contend that the Canadian
11 proceeding is closed, do you?

12 **MR. SMITH:** Closed -- I mean, what is your -- what is
13 your definition of "closed," I guess is what I'm asking.

14 **THE COURT:** Well, I'm not -- I'm not trying to be coy
15 about it. Your -- one of your briefs says -- one of your
16 brief correctly states the proposition of law that the 1782
17 relief is not available with respect to a closed foreign
18 proceeding. That's true. That's one of the things that
19 *Intel* --

20 **MR. SMITH:** Oh, okay.

21 **THE COURT:** And what you say in your brief is, the
22 Court should treat this as though it is a closed proceeding.

23 And my question to you, which I take from your brief, is I
24 take that point. But you do not actually contend that the
25 Canadian proceeding is closed, do you?

1 **MR. SMITH:** Ah. Now I understand your question, Your
2 Honor.

3 So the reason that argument is in there is because the --

4 **THE COURT:** Mr. Smith?

5 **MR. SMITH:** Yes.

6 **THE COURT:** You do not actually contend that the
7 Canadian proceeding is closed, do you?

8 **MR. SMITH:** Not the proceeding itself, but the
9 execution of the search warrant is closed so that's why I said
10 it was akin to a closed proceeding.

11 Once the search warrant has expired, you -- a party cannot
12 execute on that. The pre-litigation discovery period has
13 closed. And that's the argument. So that's why if the
14 subpoena is based on the pre-litigation discovery Anton Piller
15 order, that is now closed because the order has expired.

16 All the evidence has been seized, obtained. And, Your
17 Honor, the Anton Piller order was never targeted at Mr. Roosen
18 or Game Server Kings at all. It was only targeted at
19 Mr. Gervais and his Discord data. So to issue a subpoena here
20 to Discord seeking data from Mr. Roosen and also Game Server
21 Kings falls far outside the scope of the Anton pillar order
22 that was issued.

23 It wasn't a search of the premise of Mr. Roosen or Game
24 Server Kings, and, therefore --

25 **THE COURT:** Right.

1 **MR. SMITH:** Yeah.

2 And, Your Honor, you know, putting aside the -- the aid of
3 whether the Anton Piller order has expired, which it has, the
4 subpoena itself is still vastly overbroad, and it reflects a
5 improper attempt to obtain trade secrets from a direct and
6 primary competitor.

7 As we've argued in the brief, you know, the subpoena
8 sought, for example, the Discord data of a username -- named
9 ryz0r. Path and Tempest knew full well that ryz0r was not an
10 alias or Discord username of Mr. Roosen. Yet, they
11 nonetheless put it in the subpoena and not until we --
12 Mr. Roosen intervened and had a declaration from Mr. Ryan
13 Nacker, who is ryz0r, that, you know, that is his username,
14 did Path and Tempest now back off from the fact that they are
15 trying to get data from that particular username.

16 That is just one example of why this subpoena is overbroad
17 on its face.

18 It also -- another example is it has no time limit
19 whatsoever. If you look -- look at the allegations in the
20 Canadian proceeding, the relevant time period is a mere six
21 months from around June 2022 through January 2023. Yet, Path
22 and Tempest want Discord data from Mr. Roosen and Game Server
23 Kings from the entire period that's available on -- on
24 Discord.

25 That is way overbroad. There is no reason why it needs to

1 be broader. And as we argued in the brief, it's not plausible
2 that Curtis Gervais was communicating allegedly confidential
3 information or defamatory information to Mr. Roosen before
4 June 2022.

5 The reason is, Mr. Gervais was working for Path and
6 Tempest at that time and was actually, you know, hacking into
7 Game Server Kings, working on behalf of Path and Tempest. And
8 that's why he allegedly was demoted from his position as CEO,
9 so it's just implausible that there was any sort of defamation
10 or exchange of confidential information before January --
11 June 2022.

12 Moreover, with respect to the ending time period in
13 January 2023, that's when the Anton Piller order issued.
14 That's when the injunction against Mr. Gervais issued. That's
15 when all his devices were seized and searched.

16 There is no plausible allegation that any sort of
17 confidential information was transferred to Mr. Roosen or
18 defamatory statements continued after that point.

19 So if the subpoena issues at all, it needs to be limited
20 to that six-month time period.

21 Also, Your Honor, the subpoena again seeks the data and
22 the information of Mr. Roosen. That is not what the Canadian
23 proceeding is about. The Canadian proceeding is about
24 Mr. Gervais --

25 **THE COURT:** I think you can hold your fire on that

1 issue. I want to ask Ms. Bogen about that.

2 **MR. SMITH:** Yes, Your Honor.

3 So the -- so basically -- you know, at the end of the day,
4 what is going on here with the subpoena is that a direct
5 competitor is trying to get at the trade secret information of
6 Mr. Roosen and Game Server Kings.

7 As we set forth in the declarations, Game Server Kings
8 uses Discord to provide customer service functions, right? So
9 the way Discord is set up, there is a channel -- sorry -- a
10 server and then when -- in that -- within that server are
11 various channels. And the way Game Server Kings operates is
12 that it creates a channel for each of its customers, right?
13 And in the -- in that channel, they invite -- and this is
14 private only -- they invite the customers contexts -- contacts
15 to participate.

16 And that customer can raise issues, can -- they can
17 discuss pricing, other matters. And what the subpoena
18 seeks -- and this was snuck in sort of at the last minute
19 after, you know, Magistrate Judge Kang looked at -- had the
20 hearing on the subpoena.

21 The subpoena seeks the server names and channels that
22 Mr. Roosen and Game Server Kings has joined. There's
23 absolutely no reason to get that -- that information other
24 than the fact that Path and Tempest want to know the customers
25 that Game Server Kings has and the contacts at those

1 particular customers, right?

2 Because if you -- if you think about it, the subpoena at
3 this point is narrowed to non-content. So there really is no
4 reason to get a list of customers and a list of customer
5 contacts, right? And even if there -- the subpoena provides
6 for header information, when Mr. Roosen may have talked to X,
7 Y and Z, that's not going to establish anything. It's not
8 going to show that he conveyed confidential information or
9 provided allegedly defamatory statements. Why? Because the
10 content of that communication is not being provided.

11 So at the end of the day, the subpoena, because it's now
12 limited to non-content, isn't going to provide anything of use
13 or value to the --

14 **THE COURT:** I'm sure -- I'm sure if the applicant
15 thought they could get content, they would have asked for it.
16 And so --

17 **MR. SMITH:** And --

18 **THE COURT:** So what they -- excuse me.

19 **MR. SMITH:** Yeah.

20 **THE COURT:** And so my -- my inference is that they're
21 going to do what litigators in discovery do. They're going to
22 get what they can get out of the subpoena, and then they'll
23 follow up by way of interrogatory or deposition or whatever
24 the appropriate Canadian or American discovery device is to
25 find out more in those instances where what appears to be a

1 relevant contact took place. I don't know.

2 **MR. SMITH:** But it's not going to show relative --
3 relevant contacts, Your Honor, because it's going to be a list
4 of people that Mr. Roosen talked to. And it's not going to be
5 a list of people that Mr. Roosen talked to that may have
6 provided confidential information, right, because it's not
7 going to disclose the content of the communications. The --
8 Magistrate Judge Kang has already.

9 **THE COURT:** He says it's Kong [phonetic] by the way.

10 **MR. SMITH:** Sorry, Kong [phonetic].

11 **THE COURT:** Yeah.

12 **MR. SMITH:** And they -- the -- he's already
13 disallowed that. So at the end of the day, the subpoena
14 serves no useful purpose, except it's going to disclose the
15 confidential information, i.e., the customer list, the
16 customer contacts of Game Server Kings, which then Path and
17 Tempest can use to potentially poach those customers from GSK.

18 Also, you know, as we set forth in the brief, we're not
19 dealing with, you know, an innocuous CEO of a company. We're
20 dealing with someone that was a black hat --

21 **THE COURT:** Yeah, I have to say, Mr. Smith. I
22 wondered if you were going to go there. The whole sinister
23 cast that hangs over this briefing, really, I don't think took
24 me to the place you were hoping. The --

25 (Simultaneous colloquy.)

1 **THE COURT:** -- tremendous amount of sort of
2 pot-boiler language in the brief that I don't -- it just
3 didn't help me very much.

4 **MR. SMITH:** Yes, Your Honor. And it's just -- you
5 know, it's a -- it's a fear of GSK because of the prior
6 history of its -- of the CEO of its primary competitor, so it
7 was in there for that reason.

8 And with that, Your Honor, you know, at a minimum, because
9 all the Canadian court proceedings are stayed, this Court
10 should at a minimum stay execution of the subpoena until
11 further developments occur in the Canadian litigation.

12 You know, again, the Anton Piller order might be deemed
13 void ab initio. It's unclear whether the case will actually
14 enter into discovery in the first place.

15 **THE COURT:** Thanks. Mr. Smith, just so you know, I
16 added a few minutes to your time --

17 **MR. SMITH:** Thank you.

18 **THE COURT:** -- which expired a few minutes ago.

19 Ms. Bogen, so let me actually start by just asking you
20 some questions --

21 **MS. BOGEN:** Absolutely.

22 **THE COURT:** -- to help frame this.

23 I don't think you need to argue the points I was
24 discussing with Mr. Smith because I think those turn out the
25 way I indicated in my remarks to him.

1 I am curious about this trade secret point. You address
2 that in your opposition with someone's declaration. And then,
3 appropriately, the Roosen -- Mr. -- intervenors -- I'll just
4 say intervenors -- responded in their reply, as -- as one
5 would expect.

6 So I don't know what your client's response to the reply
7 is regarding whether this information is, in fact, trade
8 secret.

9 **MS. BOGEN:** Yes, Your Honor.

10 The -- this information, the customer names, are not trade
11 secrets. I can tell you that right now.

12 I would like to respond -- I would like to note first for
13 the Court that in order for something to be a trade secret, it
14 does have to meet certain factors under California and federal
15 law. And one of those factors is that the owner of those
16 trade secrets has to take reasonable measures to keep them out
17 of public view.

18 As we showed the Court, the customer lists are publicly
19 available. I understand that Mr. Roosen's argument was not
20 all customer lists are publicly available and that there are
21 private chats in which certain customer names are kept out of
22 the public view.

23 This is not accurate. After speaking to our clients,
24 there are still other websites that can be used to find these
25 customer names, but more importantly --

1 **THE COURT:** I don't have that in the record before
2 me. I mean, you seem like a credible lawyer, but I -- but
3 I -- it would be a rare day in which I simply took your word
4 for it, right?

5 I mean, you and I can agree that what you just said is not
6 in the record.

7 **MS. BOGEN:** Yes, we can agree on that, Your Honor.

8 And I'm happy to file a supplemental declaration. I
9 understand it's not in the record now, but I can represent to
10 you that, pivoting briefly to a separate point, Mr. Roosen is
11 not the one who determines whether or not these customer names
12 are kept in or out of the public view. It's the customer
13 themselves, who is interacting with these servers, that sets
14 them up in a way that keeps them out of the public view.

15 So, technically, Mr. Roosen is not an owner and just
16 because certain private chats on GSK servers exist does not
17 automatically mean that the participants in those chats are
18 the same users that are keeping their information private.
19 It's apples and oranges.

20 And we are happy to submit a supplemental briefing or
21 declaration to the extent you need it, but I do understand
22 it's not record, and I apologize for that.

23 **THE COURT:** No. No need to be apologize. It just
24 needs to be clear what's appropriate for me to consider or
25 not. It's --

(Simultaneous colloquy.)

MS. BOGEN: -- want to point out if Your Honor would permit, just because Mr. Roosen and GSK say that something is a trade secret, though, does not automatically make it a trade secret. That word is sprinkled throughout both the corrected motion and the reply. But Mr. Roosen never goes into any analysis as to why these names standing alone constitute customer lists or constitute trade secrets.

And the failure to do that analysis at all should take it out of the Court's consideration completely.

THE COURT: Well, that's a good argument. I would have to say I think there's a lot of history on the side of customer lists in general being protectable.

MS. BOGEN: I understand that, but even the cases that hold that customer lists are trade secrets go through that analysis. And I -- our position is that that's a critical piece that's missing here.

THE COURT: Okay.

All right. Let me ask you something else. So the argument is made that you're going get -- you don't need Mr. Roosen's information that doesn't involve Mr. Gervais, if I'm saying that correctly, because you're going to get Gervais's information. And that will automatically pick up any communications between Gervais and Roosen's, so why do you need Roosen's information separately?

1 What's the answer for that?

2 **MS. BOGEN:** We need separately Mr. Roosen's
3 information separately because there's no guarantee that
4 Roosen and Gervais always acted together. It's entirely
5 possible that Mr. Roosen acted alone in furtherance of the
6 conspiracy by himself.

7 And if you look to the language of the some of the orders
8 issued by the Canadian Court -- not to say that this case is
9 only about those orders, but if you do look at them, they make
10 statements stating that there is convincing evidence that
11 Roosen and those acting under his control are engaging in
12 misconduct. That's the Warren affidavit that was attached to
13 our original application, Tab E, page 110. So this case is
14 not just about Gervais.

15 It's about people acting under his control as well. And
16 it doesn't follow that just because they weren't acting
17 entirely together at all times, that Mr. Roosen was out of his
18 control when he was acting alone.

19 It's entirely possible that he was acting in furtherance
20 of the conspiracy on his own without Gervais sitting next to
21 him at all times.

22 **THE COURT:** I don't know if I'll reach this
23 conclusion, but what if I were to find that the subpoena would
24 or would be likely to call for the production of trade secret
25 information?

1 At the moment, the parties' positions are Mr. Smith's
2 position, which is I should limit access to United States only
3 counsel, which is a level of protection that I have never
4 afforded in any litigation because it would mean excluding
5 even the Canadian lawyers from access, and I just -- I don't
6 think I -- I can't imagine doing that. But, anyway, that's
7 his position.

8 And your position is essentially there shouldn't be --
9 this case does not call for the issuance of a separate
10 protective order other than the one that was approved by judge
11 Kang.

12 Is that were you want the bidding to stop?

13 You understand what I'm saying? I'm a baseball
14 arbitration person, okay?

15 I don't -- I don't want to reinvent the wheel for every
16 single decision that comes across my desk. I just don't -- I
17 just don't have the capacity to do that. So very often, I
18 just take the parties' two positions, and I pick one. It
19 might not be the one that I would have chosen if I start from
20 scratch, but it's -- I just don't have the energy to start
21 everything from scratch.

22 So my question is, is there -- do you think that if I
23 thought trade secrets might be in play, there is further work
24 that could be done on the existing protective order to
25 reassure the intervenors?

1 **MS. BOGEN:** Absolutely, Your Honor. Some sort of
2 additional provision in the protective order guaranteeing that
3 the data is not going to be misused for that purpose --

4 I mean, that being said, there would have to be an
5 understanding that if certain customers ultimately leave GSK
6 and go to Path, that could also happen without Path or Tempest
7 having anything to do with it, so that does feel a little bit
8 dangerous. But I think that we could certainly work with the
9 wording to ensure those protections, because at the end of the
10 day, this case isn't about trade secrets.

11 Both parties -- at least subject to this instant motion --
12 think that the other party is engaging in misconduct
13 and poaching their clients, and that's what the whole case is
14 about.

15 So I think it just gets a little sticky when you get into
16 the weeds of it. And it might be something that would be
17 better determined by the Canadian Court once it has all the
18 information, because the fact is we just don't know yet what
19 this discovery is going to show. And that's why we're seeking
20 it, to further the Canadian action.

21 **THE COURT:** How do I put my fingers on the Canadian
22 complaint in the record?

23 **MS. BOGEN:** It is Tab A to the Warren affidavit
24 that's attached to the original application, ECF 1.

25 **THE COURT:** Thanks. Give me just a second. I

1 have -- I was working on something totally different right
2 before this hearing so I don't even have the right docket open
3 on my computer.

4 **MS. BOGEN:** No problem.

5 I can given you the page number.

6 **THE COURT:** No, that's fine. You said it's attached
7 to the declaration of Tom Warren.

8 **MS. BOGEN:** Yes.

9 **THE COURT:** At ECF 1-2.

10 **MS. BOGEN:** Exactly.

11 **THE COURT:** Yeah. Give me just a second.

12 (Pause in the proceedings.)

13 **THE COURT:** So is the -- is the equivalent to what we
14 would call the complaint, the statement of claim?

15 **MS. BOGEN:** Yes. And in these proceedings, that's
16 not sealed. I just want to make that clear.

17 **THE COURT:** Okay. All right.

18 Let me see if I had other questions for you.

19 **MS. BOGEN:** If I could just add one note on the trade
20 secrets issue, if you'll allow me, Your Honor.

21 **THE COURT:** Sure. Yeah. Please.

22 **MS. BOGEN:** So I understand there's a concern of
23 trade secret theft that's brought by Mr. Roosen and GSK. But
24 the fact is -- and I know it's not record. I am representing
25 to you, though, that if Path wanted to access GSK and Roosen's

1 customers, they could, so that's not the goal of this
2 subpoena. The goal is to see how Roosen and Gervais are
3 co-conspiring to harm them.

4 And as the court in Discord have recognized over the past
5 now ten months that this has been pending, the Discord
6 subpoena is fully legitimate. And it's not being used for any
7 ulterior motive or improper purpose.

8 **THE COURT:** Yeah, I appreciate -- I appreciate both
9 of your representations about your client's motives and goals
10 and the other side's -- your clients think each other are
11 liars and knaves, so --

12 **MS. BOGEN:** Yeah.

13 **THE COURT:** -- I have to take all of the unsupported
14 things with the large grain of salt.

15 Okay. I think that was it. You can go ahead and make
16 whatever other additional argument you wanted to make.

17 **MS. BOGEN:** Give me one moment, Your Honor.

18 I don't want to take up your time discussing things that
19 we've already discussed.

20 I wanted to preliminarily say that, you know, this case
21 has been pending for some time, and the parties did engage in
22 two rounds of meet-and-confer efforts and two rounds of
23 briefing to ensure that the subpoena was lawful in every way,
24 that it didn't violate the Stored Communications Act, that a
25 protective order to protect all relevant parties' rights was

1 in place. And that is what got us to the issuance of the
2 subpoena on December 26th. And it should be given some weight
3 that Judge Kang did hold that the subpoena was proper after
4 all of that time.

5 But turning briefly to Mr. Roosen's arguments, I think the
6 court already discussed this so feel free to tell me to move
7 on. But the case is not just about the Anton Piller order,
8 but also it's not expired.

9 The case was suspended, and the exact language of that
10 judge's order suspending the case says, "all issues and
11 procedures are suspended." It doesn't say "stayed," so those
12 representations are just without merit.

13 But even if that order was expired, this case is about
14 much more than that. In the Court's November --

15 **THE COURT:** I think you win this point. I'll just
16 tell you. I --

17 **MS. BOGEN:** Okay.

18 **THE COURT:** -- think you win this point.

19 **MS. BOGEN:** I'll move on.

20 **THE COURT:** We're running down a very narrow alley
21 right now. *Intel* couldn't be clearer.

22 **MS. BOGEN:** Yeah.

23 **THE COURT:** The Canadian proceeding is open, even if
24 there's no activity taking place in the case right now.

25 **MS. BOGEN:** Okay.

1 **THE COURT:** And you -- your party is going to have --
2 your clients are going to have standing to present evidence to
3 that tribunal --

4 **MS. BOGEN:** Um-hmm.

5 **THE COURT:** -- if they want to at some point.

6 We don't have -- whatever that Second Circuit case was.
7 That's Common [sic] Funds, whatever it is. That's not the
8 issue here.

9 **MS. BOGEN:** Um-hmm.

10 **THE COURT:** And so that's -- I'm not worried about
11 any of those issues.

12 **MS. BOGEN:** Okay.

13 I think the only issues I wanted to raise with you are
14 Mr. Roosen's arguments in the alternative, so the
15 U.S. Attorney's Eyes Only -- it's our position that it would
16 defeat the entire purpose of 1782, which is collect --

17 **THE COURT:** I'm not going to --

18 (Simultaneous colloquy.)

19 **THE COURT:** I'm not going to issue an attorneys' --
20 I'm not going to issue an order that says you get 1782 but no
21 one in Canada can see it. That's not what the order says.

22 **MS. BOGEN:** Okay. Thank you, Your Honor.

23 And then with respect to the time limitation, our position
24 is that it's arbitrary, but we would ask if the Court is
25 inclined to issue any sort of limitation that it extend them

1 till present day, because as stated in the Warren affidavit,
2 there's evidence suggesting that preservation of data remains
3 an issue.

4 We have no reason to believe that any of the alleged
5 misconduct has stopped by January 9, 2023, just because that's
6 the last allegation in the statement of claim.

7 And then the last request that Mr. Roosen makes is to hold
8 on execution of the subpoena until there's more clarity into
9 the Canadian proceeding. Path has established that these
10 proceedings are legitimate.

11 And, lastly, any request for sanctions should be
12 completely rejected. This is a legitimate request for a
13 subpoena. There's no frivolous --

14 **THE COURT:** I think sanctions requires a separate
15 motion under our local rules. And I -- and this is not a
16 sanctions case anyway. You don't need to address it.

17 **MS. BOGEN:** Okay.

18 Well, for the reasons outlined, this -- Path and Tempest
19 respectfully request that the Court deny Mr. Roosen and GSK's
20 motion.

21 Thank you, Your Honor.

22 **THE COURT:** Mr. Smith, you want a couple minutes to
23 respond? It's your burden.

24 **MR. SMITH:** Yes, Your Honor.

25 With respect to the time limitation which opposing counsel

1 just spoke to, she said, there was -- you know, that -- they
2 have -- believed that maybe that the conveyance of
3 confidential information or defamatory statements are
4 continuing today. That's pure speculation. There is
5 absolutely no evidence of that in the record. All that there
6 is is what's in the -- the statement of claim in the Canadian
7 case.

8 Again, the last --

9 **THE COURT:** I think she's bargaining with you in real
10 time, and she's using me as a foil to do it.

11 She -- what she's saying to you is, if I can have until
12 the present day, I'll give you the bottom end of the
13 timelines. I mean, that's not actually what she said. But
14 it's net effect of what she said. You can decide you don't
15 want the deal. But that's what she was doing.

16 **MR. SMITH:** Right, and then -- we're happy to meet
17 and confer with her if that's what Your Honor wants us to do.

18 And to make it clear, when Counsel is talking about the
19 parties meeting and conferring, that was only Discord with
20 Path and Tempest. Mr. Roosen and Game Server Kings were not
21 part of that proceeding whatsoever --

22 **THE COURT:** I didn't say anything to Ms. Bogen, but
23 the fact that Judge Kang made whatever findings he made
24 doesn't have -- doesn't have much bearing on today, because --
25 I beg your pardon -- you were not a party to that proceeding,

1 so by definition, your concerns were not considered, so
2 whatever Judge Kang said it was not addressed to your
3 concerns. So don't worry about that.

4 **MR. SMITH:** Thank you, Your Honor.

5 Regarding the issue of the trade secrets, you know, the
6 argument that's being made that we didn't adequately allege
7 trade secrets or establish trade secrets, I don't believe that
8 was made in the opposition.

9 But as Your Honor notes, customer lists, customer
10 contacts, that's quintessential trade secret information. GSK
11 does meet all the requirements for trade secret protection.
12 In particular, when it uses Discord, there's the option to
13 make the channel and the server public. But there's also to
14 make it private invite only, and that's how Game Server Kings
15 uses it. They only allow private invite only -- they only
16 send private-invite-only invitations to each of its customers
17 to then log on to the website, right?

18 So, you know, again, it's quintessential trade secret
19 information. And, again, you know, this Canadian litigation,
20 I want to emphasize that it is targeting Mr. Gervais. Right?

21 Mr. Gervais --

22 **THE COURT:** Well, I just pulled up that statement of
23 claim, and Mr. Roosen's right in there.

24 **MR. SMITH:** Mr. Roosen is right -- is mentioned in
25 the statement of claim as allegedly the recipient of the

1 confidential information. But he is not a defendant in the
2 Canadian proceeding.

3 **THE COURT:** Would he submit to the jurisdiction of
4 the Canadian courts?

5 **MR. SMITH:** Sorry. What was your question?

6 **THE COURT:** Would he -- the argument is made that the
7 reason he's not a defendant is that he's not subject to the
8 jurisdiction of the Canadian courts. I'm just curious to know
9 if he wants to call that bluff, would he submit for the
10 jurisdiction of the Canadian courts?

11 **MR. SMITH:** I'm not prepared to ask -- answer that
12 question. I would have to speak with him, but they -- you
13 know, I'm not sure there was even an attempt by Path and
14 Tempest to bring him into the Canadian courts or if -- even if
15 that was asked.

16 You know, Game Server Kings is a U.S. based company. I
17 think it's telling that Path and Tempest have not tried to sue
18 Game Server Kings here in the United States despite this
19 alleged conspiracy in the Canadian proceeding, Your Honor.

20 And, you know, I understand your point about the *Intel*
21 case. But I also want to make clear that another one of the
22 factors -- isn't just -- you know, is the information for use
23 in the Canadian proceeding.

24 But, again, are there -- is there -- are there -- are Path
25 and Tempest circumventing the limits on discovery imposed by

1 the Canadian court? We heard Ms. -- opposing counsel say that
2 everything was suspended. That seems to be semantics.
3 Whether suspension equals a stay. To me, that's one in the
4 same thing. When you suspend all proceedings, that means
5 you're staying the proceedings.

6 The discovery is not going on. There are serious issues
7 that need to be resolved in the Canadian case. Again, the
8 case is getting -- to my understanding is being transferred
9 out of Perth, Canada, to a courthouse in Toronto. There's
10 going to be a new judge. There's still the pending motion to
11 set aside the Anton Piller order.

12 All that needs to be resolved before this subpoena should
13 issue. And there's ample precedent -- and we've cited a case
14 to this effect in our brief -- that the Court has the power to
15 stay issuance of the proceedings -- or of the -- of the
16 subpoena until there are further developments in the foreign
17 proceeding; here, you know, whether discovery is even going to
18 be allowed to go forward. And then if so, to what extent.

19 The Court can, you know, exercise its discretion in
20 deference to the Canadian court proceedings, which, again, are
21 suspended, which, to my knowledge, means that they're stayed.

22 **THE COURT:** Very good. I'm going to wrap it up.

23 Let me ask -- I do think that the record could be a little
24 better on this trade secret question. I don't remember as I
25 sit here whether there's -- you know, Ms. Bogen argued that

1 the intervenors did not do a good enough job in establishing
2 legally that these categories of information are trade
3 secrets. I don't have an opinion about that, 'cause I just
4 don't remember the briefing off the top of my head.

5 The part that I think I might benefit from a little more
6 information about is Ms. Bogen says, hey, it's not in the
7 record, but, Judge, I think I can prove to you that,
8 notwithstanding the reply -- I want to say it was Roosen
9 declaration -- we can show that none of this stuff is trade
10 secret. We can show it as a factual matter.

11 But if I gave Ms. Bogen that opportunity, obviously,
12 Mr. Smith, I'd get -- let you have the last word, so she'd
13 file a very short surreply, and you'd file a sur-surreply.

14 And, Ms. Bogen, if you wanted to include in there some
15 additional legal authorities that you thought would be helpful
16 on the questions of whether these things are trade secrets at
17 all or whether intervenors had met their burden, you could.
18 And -- and even though -- and even though Mr. Smith would have
19 the last word, I think, Mr. Smith, I would let you cure
20 whatever deficiencies Ms. Bogen is accusing you of in your
21 legal support for whether these things are trade secrets.

22 I would just -- even though it wouldn't be coming in
23 simultaneously, I would like to hear a little more from both
24 of you on that question if you'd like to provide it.

25 Eight pages, I think, sounds about the right amount.

1 Ms. Bogen, how does that sound to you?

2 **MS. BOGEN:** Eight pages total or joint briefing four
3 and four?

4 **THE COURT:** No, no. Total, but double -- you know,
5 double-spaced.

6 **MS. BOGEN:** Yes. That's fine. Your Honor.

7 **THE COURT:** And then, you know, you can attach
8 whatever declaration you need to to your brief to establish as
9 a factual matter what you said at the hearing today, which is
10 that in addition to the website cited in your materials, there
11 are other ways in which your client could get a hold of this
12 information if they wanted it.

13 And then, Mr. Smith, you could have eight pages to reply.

14 **MR. SMITH:** Appreciate that, Your Honor. We're happy
15 to brief.

16 I'll just point out that if this information is all truly
17 public, it just further underscores that there's no need to
18 subpoena the information, which is an argument we made in --

19 **THE COURT:** Yeah, I recall that argument from your
20 brief. I got it.

21 Ms. Bogen, when can you have that brief in, do you think?

22 **MS. BOGEN:** I defer to the Court on whatever works
23 best for it, but I don't think we should have a problem
24 submitting it within the next 14 days.

25 Is that too long?

1 **THE COURT:** It's not too long for me. You're the one
2 who wants the information, so -- I mean, that's why I started
3 with you.

4 **MS. BOGEN:** Fourteen days.

5 **THE COURT:** You want the train to go faster, and
6 Mr. Smith wants it to go slower, so 14 days is fine.

7 Mr. Smith, you want 14 days to respond?

8 **MR. SMITH:** Yes, Your Honor. That'd be sufficient.

9 **THE COURT:** Okay. So then we're looking at April 11
10 and April 25. I probably won't ask for a further hearing, so
11 unless I order otherwise, the motion will then go under
12 submission at that point.

13 **MS. BOGEN:** Okay.

14 **THE COURT:** Thank you both for your arguments today.

15 **MS. BOGEN:** Thank you, Your Honor.

16 **MR. SMITH:** Thank you, Your Honor.

17 **THE CLERK:** Thank you, Judge.

18 (Proceedings were concluded at 2:43 P.M.)

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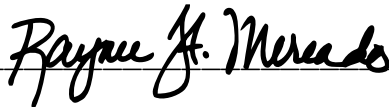
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.



Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Thursday, April 25, 2024